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## **Blushing Our Way Past Historical Fact and Fiction: A Response to Professor Geoffrey R. Stone's Melville B. Nimmer Memorial Lecture and Essa**

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## Articles

# Blushing Our Way Past Historical Fact and Fiction: A Response to Professor Geoffrey R. Stone's Melville B. Nimmer Memorial Lecture and Essay

Seth Barrett Tillman\*

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\* Seth Barrett Tillman is a career federal law clerk. Adjunct Professor Rutgers University School of Law (Newark). The views expressed are solely my own. I thank Professors Benjamin H. Barton, H. Jefferson Powell, Jonathan Weinberg, and Jay D. Wexler for comments. I also thank the extraordinarily helpful librarians at Bloomsburg University, Messiah College, Methodist Theological School in Ohio, Misericordia University, Scranton University, Virginia Theological Seminary, and the Osterhout Free Library. I note that I have intentionally departed from *The Bluebook* in places for reasons of clarity and in order to demonstrate the ease with which once difficult to find sources may now be checked online. Preferred citation format: Seth Barrett Tillman, *Blushing Our Way Past Historical Fact And Fiction: A Response to Professor Geoffrey R. Stone's Melville B. Nimmer Memorial Lecture and Essay*, 114 PENN ST. L. REV. 391 (2009) (unabridged version), available at <http://ssrn.com/abstract=1333576>. An abridged version of this article originally appeared as Seth Barrett Tillman, Response, *Blushing Our Way Past History*, 2009 CARDOZO L. REV. DE NOVO 46, available at <http://tinyurl.com/qcql96>, also available at <http://ssrn.com/abstract=1399661>. As this article goes to publication, *De Novo* intends to publish several responsive pieces, including: Robert F. Blomquist, Response, *Beyond Historical Blushing: A Plea for Constitutional Intelligence*, 2009 CARDOZO L. REV. DE NOVO 244, available at <http://tinyurl.com/yilm5vpv>, also available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1483893](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1483893), Steve Sheppard, Response,

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Legal academics and the public are fascinated by both constitutional text and the processes by which it is interpreted. The precise role for legal academics in the interpretation of such charters is controverted. Doctrine and case law as established by the courts remain the core of academic legal discourse. Case law is, after all, the object about which doctrine is based, built, and extended. But the interpretation of constitutional text through case law comes with costs—it seems to lack democratic legitimacy, and where unconnected to text and history, it has a tendency to fence out (even the well-educated) public.<sup>1</sup> On the other hand, when legal academics shift to text and history, their work gains populist credentials, but, at that point, the legal academic risks his privileged position. For the legal academic has no monopoly, or even highly developed expertise, with regard to textual exegesis or the best use of historical materials.<sup>2</sup> In light of those attendant risks, I want to praise Professor Geoffrey R. Stone for taking on the role of exegete and historian. But that said, I find some of his specific textual and historical claims troubling. I respond to his textual and historical claims in detail below. This Article, however, has *no* grand normative claim of its own; it has *no* grand methodological vision; rather, it is merely an effort on my

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*What Oaths Meant to the Framers' Generation: A Preliminary Sketch*, 2009 CARDOZO L. REV. DE NOVO 273, available at <http://tinyurl.com/yk6974l>, and Bruce G. Peabody, Response, *Analogize This: Constitutional Interpretation, Religion, and Maintaining the Political Order*, 2009 CARDOZO L. REV. DE NOVO (forthcoming).

1. For a wonderful example of this genre (and its inherent limits), see Christopher C. Lund, *Equal Liberty and Religious Exemptions: A Response to Eisgruber and Sager*, 77 TENN. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1263514> (last visited July 18, 2009). In an extensive discussion of First Amendment case law, doctrine, and legal scholarship, the Constitution's text is nowhere quoted. It is not even cited. This is *not* a criticism of Professor Lund's paper. I am just noting that such scholarship takes on the flavor of inside baseball.

2. See, e.g., *infra* notes 26, 31-41 and accompanying text (discussing Professor Stone's historical claims in detail); cf., e.g., *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("During the debates in the Thirteen Colonies over ratification of the Constitution . . .").

part to correct the record, and thereby to further the object pursued first by Professor Stone: “to know the truth about the Framers, about what they believed, and about what they aspired to when they created this nation.”<sup>3</sup>

## I. AN ANALYSIS OF PROFESSOR STONE’S TEXTUAL CLAIMS

In *The World of the Framers: A Christian Nation?*, a recent article appearing in another law review, Professor Stone wrote:

Indeed, it is quite striking, and certainly no accident, that unlike the Fundamental Orders of Connecticut, the U.S. Constitution made no reference whatsoever to God and cited as its primary source of authority not “the word of God,” but “We the People.” The stated purpose of the Constitution was not to create a “Government established according to God,” nor to establish a “Christian nation,” but rather to create a secular state. The *only* reference to religion in the original Constitution prohibited the use of any religious test for holding office, and the First Amendment made clear that there “would be no Church of the United States.”<sup>4</sup>

Is that correct? Is it true that the text makes “no reference whatsoever to God”? Is it true that the “*only* reference to religion” in the original unamended text was the Religious Test Clause? To me at least, these seem to be an unusually strong set of (textual) claims for a law review article: claims lacking recognition of ambiguity and contrary points of view.

*The Attestation Clause.* Every copy of the Constitution I have seen since childhood ends with:

Done in Convention by the Unanimous Consent of the States present  
the Seventeenth Day of September in the Year of our Lord one

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3. Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 UCLA L. REV. 1 (2008), available at <http://tinyurl.com/bqk8tq>.

4. *Id.* at 5 (footnotes omitted); see also James E. Pfander, *So Help Me God: Religion and Presidential Oath-Taking*, 16 CONST. COMM. 549, 550 (1999) (“Unlike the Declaration of Independence and the Articles of Confederation, both of which invoked God’s blessing, the Constitution contains no reference to God.”); Brooke Allen, *Our Godless Constitution*, THE NATION, Feb. 3, 2005, at 14, available at <http://tinyurl.com/6lr128> (“Our Constitution makes no mention whatever of God.”); Nat Hentoff, *God Is Not in the Constitution*, THE VILLAGE VOICE, July 2, 2002, at 31, available at <http://tinyurl.com/q8v9h9> (“An even longer American tradition is that there is no mention of God in the Constitution.”). How is it “striking” that the Constitution of 1787 stylistically veered from the Fundamental Orders of Connecticut—an instrument 150 years older than the Constitution at the time of ratification? Is not the relevant benchmark how the Constitution veered from contemporaneous instruments of a similar character? See *infra* note 5.

thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth . . . .<sup>5</sup>

Is not that a direct textual reference to God, even if not your God or mine, or even if you do not believe in any God at all? I am certainly not suggesting that the presence of this clause makes ours a Christian nation, nor am I suggesting that even any one Framer or Ratifier thought that this clause had a justiciable meaning that could control a live case or

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5. U.S. CONST. art. VII, cl. 2 (Attestation Clause). See generally Posting of Seth Barrett Tillman to Humanities and Social Sciences Net Online, Constitution's References to God, <http://tinyurl.com/7h63no> (Nov. 3, 2003, 16:00:48 PST) (noting potential significance of dual dating in Article VII); EDWIN MEESE ET AL., THE HERITAGE GUIDE TO THE CONSTITUTION 301-02 (2005) (same). But see Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U. L. REV. 120, 125 n.19 (2008) (stating that "[t]he reference to 'the Year of our Lord' simply employed the conventional dating method of the era") (emphasis added). What is important to note here is that Professor Smith's view is neither an interpretation of a legal instrument nor a (pure) legal intuition; rather, it is his understanding of an eighteenth century cultural convention or folkway. Because his opinion here is one unrelated to legal expertise, it is entitled to no special deference. In other words, although Professor Smith's position is common wisdom, early American legal materials, in fact, used a variety of dating conventions. Simply put, there was no single "conventional dating method." See, e.g., Articles of Association of 1774 (dated "In Congress, Philadelphia, October 20, 1774"); THE DECLARATION OF INDEPENDENCE (dated "July 4, 1776"); DEL. CONST. of 1776 (dated "Friday, September 10, 1776"); N.H. CONST. of 1776 (dated "January 5, 1776"); N.J. CONST. of 1776 (dated "July 2, 1776"); N.C. CONST. of 1776 (dated "December the eighteenth, one thousand seven hundred and seventy-six"); PA. CONST. of 1776 (dated "Passed in Convention the 28th day of September, 1776"); S.C. CONST. of 1776 (dated "March 26, 1776"); VA. CONST. of 1776 (not internally dated); N.Y. CONST. of 1777 (dated "20th April, 1777"); MASS. CONST. of 1780 (not internally dated). This is not to say that the dating convention used in the Constitution of 1787 was new. It was not. See Articles of Confederation of 1777 (using the same dating convention later used in the Constitution of 1787); GA. CONST. of 1777 (dated "in convention, the fifth day of February, in the year of our Lord one thousand seven hundred and seventy-seven, and in the first year of the Independence of the United States of America"); cf. MD. CONST. of 1776 (dated "14th day of August, anno domini 1776"). Of course, neither Connecticut nor Rhode Island and Providence Plantations had revolutionary era state constitutions. (The quoted material is available on The Avalon Project—Documents in Law, History and Diplomacy: 18th Century Documents: 1700-1799, <http://tinyurl.com/bej4nt> (last visited July 18, 2009), on The Constitution Society, <http://www.constitution.org> (last visited July 18, 2009), and on Constitutions of the World Online/The Rise of Modern Constitutionalism 1776-1849, <http://tinyurl.com/c3aacy> (last visited July 18, 2009).)

Interestingly, in contrast to the dating convention used in the Attestation Clause, Article V simply refers to "the Year One thousand eight hundred and eight." U.S. CONST. art. V; see Henry V. Jaffa, *Graglia's Quarrel with God: Atheism and Nihilism Masquerading as Constitutional Argument*, 4 S. CAL. INTERDISC. L.J. 715, 729 (1996). Professor Jaffa also suggests, *contra* Stone, that the Preamble's use of "blessing" was a reference to God. Compare *id.* at 718 ("What did the American people mean by a [blessing] [as used in the Constitution's Preamble], except something good in the eyes of God, something in the gift of God, something that one prayed that God might think you deserved?"), with Pfander, *supra* note 4, at 550 ("Unlike the Declaration of Independence and the Articles of Confederation, both of which invoked God's blessing, the Constitution contains no reference to God.").

controversy. But in making his argument that the United States Constitution created a “secular” nation, that the text makes “no reference whatsoever to God,” Professor Stone has simply ignored the actual text of the Constitution he seeks to explain.

*The Oaths and Affirmations Clause.* Nor is this the only such clause in the Constitution that makes some (albeit indirect) reference to God. The Article VI Oaths and Affirmations Clause mandated that all future federal and state legislators and certain<sup>6</sup> officers take an oath or affirmation to support the Constitution.<sup>7</sup> What is the difference between

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6. See Steven G. Calabresi, Response, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 162 (1995) (“No constitutional oath is required of [non-member subordinate] legislative officers, like the Clerk of the House or the Secretary of the Senate, presumably [!] because those officers were not thought to be very important.”). Compare AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 301 (2006) (“The final paragraph of Article VI obliged a *host* of state and federal policymakers to take personal oaths of allegiance ‘to support this Constitution.’”) (emphasis added), with *id.* (“Article VI forbade any ‘religious Test’ for *any* federal office or post . . . .”) (emphasis added). But see *Eakin v. Raub*, 12 Serg. & Rawle 330, 353 (Pa. 1825) (Gibson, J., dissenting) (“The oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty . . . .”); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1261 (2004) (describing the Article VI oath as “universal” and applying to “all federal and state officers”); William H. Pryor, Jr., *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 YALE L. & POL’Y REV. 347, 350 (2006) (“The Framers required in Article VI of the Constitution that all the officers of our government, including judges, ‘be bound by oath or affirmation, to support th[e] Constitution.’”); Paul Horwitz, Colloquy Essay, *Honor’s Constitutional Moment: The Oath and Presidential Transitions*, 103 NW. U. L. REV. 1067, 1069 (2009); 103 NW. U. L. REV. COLLOQUY 259, 261 (2008) (“Under Article VI of the Constitution, *every* federal and state officer takes an oath or affirmation to ‘support this Constitution.’”) (citing Article VI, Clause 3) (emphasis in the original); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 920 (2009) (“It is ‘this Constitution’—a specific written text—that *all* officers of government swear to support and to be bound by, according to its written terms.”) (emphasis added). The problem with all of the commentators above (including Professors Amar and Calabresi) is that they either fail to see or fail to put the reader on notice that there is a very real unresolved issue here: the Founders *excluded* from the operation of the Article VI oath certain officers: the Clerk of the House, the Secretary of the Senate, and, arguably, the Vice President, and President (subject to a free-standing Article II oath). See Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 135-40, 146-53 (2008), available at <http://www.pennumbra.com/debates/pdfs/GreatDivorce.pdf>. The question is *why* those officers were excluded: a subject I hope to return to in a later publication. What is important to note is that one can only answer this question if one knows there is a question here to answer.

7. See U.S. CONST. art. VI, cl. 3 (“Oath or Affirmation”); see also *id.* art. I, § 3, cl. 6 (mandating that Senators adjudicate impeachments “on Oath or Affirmation”); cf. *id.* art. II, § 1, cl. 8 (mandating that the President “swear (or affirm)” to his “Oath or

an oath and affirmation? The consensus view—and as far as I know the universal view—is that the former is taken in God’s name, but the latter is not.<sup>8</sup> The purpose of the clause—according to the standard narrative—was to permit Quakers and others having “a religious or other conscientious objections to oath-taking”<sup>9</sup> to also hold public office. The purpose is one of “inclusiveness and tolerance,”<sup>10</sup> but it is also a textual reference to God in our public charter—albeit an indirect one.

*The Sundays Excepted Clause.* Another clause that might interest us is the Sundays Excepted Clause, which provides: “If any Bill shall not be returned by the President within ten Days (*Sundays excepted*) after it shall have been presented to him, the Same shall be a Law . . . .”<sup>11</sup> Does this clause establish any specific or named religion? No. Does it establish a particular church? No. But if the intent of the Founders or Ratifiers had been “to create” no more and no less than “a secular state,”<sup>12</sup> then ought not Professor Stone tell us why this clause was

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Affirmation”). Notice how the priority was on swearing (viz., oath-taking), not affirming.

It is not surprising that the Bill of Rights—enacted some two years after the Constitution came into force—generally followed suit stylistically with the original Constitution. Compare *id.* amend. IV (1791) (mandating that warrants shall only issue if supported by an “Oath or affirmation”), with *id.* amend. XIV, § 3 (1868) (imposing a disability on those who engaged in insurrection or rebellion if they had previously taken an “oath” to the support the Constitution—notably turning to a lower case “o” and also omitting any reference to affirmations).

8. See, e.g., 67 C.J.S. *Oaths and Affirmations: Definitions and General Considerations* § 2 (1978) (defining “oath” as “an appeal by a person to God to witness the truth of what he declares”); Dictionary.com (defining an “oath” as “a solemn appeal to a deity”). See generally 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 202 (Jonathan Elliot ed., Washington, no publisher 1836) (quoting Oliver Wolcott, at the Connecticut ratifying convention, who stated that the Oaths and Affirmations Clause mandates “a direct appeal to that God who is the avenger of perjury. Such an appeal to him is a full acknowledgment of his being and providence.”), available at <http://tinyurl.com/dzojht>. For a fuller development of the legal issues and history surrounding oaths and affirmations, which I only touch on in the main text of this Article, see generally STEPHEN MICHAEL SHEPPARD, I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS (2009); MATTHEW A. PAULEY, I DO SOLEMNLY SWEAR: THE PRESIDENT’S CONSTITUTIONAL OATH: ITS MEANING AND IMPORTANCE IN THE HISTORY OF OATHS (1999); Robert F. Blomquist, *The Presidential Oath, The American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1 (2004).

9. AMAR, AMERICA’S CONSTITUTION, *supra* note 6, at 301.

10. *Id.*

11. U.S. CONST. art. I, § 7, cl. 2 (emphasis added).

12. Stone, *supra* note 3, at 5. But see Jaynie Randall, *Sundays Excepted*, 59 ALA. L. REV. 507 (2008) (arguing, contrary to Supreme Court authority, that the Sundays Excepted Clause’s purpose was to accommodate principles of deliberation and federalism by accommodating extant state blue laws, as opposed to accommodating the religious sentiments of federal office-holders).

included in the Constitution, and thereby entrenched against mundane democratic action? One wonders what purpose or purposes Professor Stone believes this clause was meant to serve.

*The Religious Test Clause.* Additionally, I note that Professor Stone wrote that the Religious Test Clause prohibits “the use of any religious test for holding office.”<sup>13</sup> I do not mean to quibble, but his position is not quite right—or, at the very least, his position is not the only possible understanding of the clause. Its meaning may have been more limited than Professor Stone suggests.

The Religious Test Clause prohibits the use of any religious test as a “Qualification to any Office or public Trust under the United States.”<sup>14</sup> In other words, textually, the clause precludes any religious test used to *qualify* a person for office—i.e., a test implemented at the time a person is elected or appointed to office, or at the start of the term for which the officer was elected or appointed, or at the time the officer accepts office or takes office by displacing<sup>15</sup> or removing his outgoing predecessor, or

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I should also point out that at I am not the first person to note the religious antecedents of the Attestation Clause, the Oaths and Affirmations Clause (and the related oaths clauses), and the Sundays Excepted Clause. *See, e.g.,* Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting) (noting “the federal government’s symbology has been Christian—down to the dating of the Constitution”). For a very full development of these issues, which I only touch on in the main text of this Article, see generally Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927 (1996); Richard Albert, *Religion in the New Republic*, 67 LA. L. REV. 1 (2006); Alan Brownstein, *The Reasons Why Originalism Provides a Weak Foundation for Interpreting Constitutional Provisions Relating to Religion*, 2009 CARDOZO L. REV. DE NOVO 196, 198 & nn.6-7.

13. Stone, *supra* note 3, at 5.

14. Compare U.S. CONST. art. VI, cl. 3 (prohibiting religious tests as a requirement to “Qualify to any Office or public Trust under the United States”), with *id.* art. I, § 3, cl. 7 (mandating that conviction on impeachment “shall not extend further than to removal from Office, and disqualification to hold and *enjoy* any Office of honor, Trust or Profit under the United States”) (emphasis added). It is not clear to me if “enjoy” refers to qualifications applying while an officer holds office or to qualifications applying to an officer who exercises the powers or duties of an office he does not hold (i.e., an acting officer). Either way, the Disqualifications Clause is distinguishable from the Religious Test Clause, the clause which interests us here.

15. Compare THE FEDERALIST NO. 77, at 407 (Alexander Hamilton) (J.R. Pole ed., 2005) (“The consent of that body [the Senate] would be necessary to *displace* as well as to appoint [officers of the United States subject to presidential nomination].”) (emphasis added), with Seth Barrett Tillman, *The Puzzle of Hamilton’s Federalist No. 77*, 33 HARV. J.L. & PUB. POL’Y 149 (forthcoming 2010) (opining on Hamilton’s use of “displace,” rather than “remove”), available at <http://ssrn.com/abstract=1331664>. See generally Jeremy D. Bailey, *The Traditional View of Hamilton’s Federalist No. 77 and an Unexpected Challenge: A Response to Seth Barrett Tillman*, 33 HARV. J.L. & PUB. POL’Y 169 (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1473276](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1473276).



at the time the officer takes his oath (or affirmation) of office, or, finally, at the time the officer first attempts to execute the powers of office. “The question with reference to *the point of time* at which [a] required qualification for office [must] exist is a complex judicial question.”<sup>16</sup> If, as I suggest, qualifications only apply at some discrete moment or point of time, then, contra Professor Stone, once qualified, once in office, once a person begins to hold office and thereafter, the Religious Test Clause has no further application (as a textual matter). Now, post-1791, such religious tests going to office-holders and office-holding, are precluded under the aegis of the more general First Amendment. But in 1789, in the (non-wholly Christian, non-wholly secular) world of the Framers and Ratifiers, under the Constitution unamended by the Bill of Rights, it very well may have been a different story.

Does my textual critique vanquish Stone’s central point—that the American Constitution’s “stated purpose [was] to create a secular state”?<sup>17</sup> No, not entirely—and it is not really my purpose to do so. In fact, it is certainly true that the Founders’ design lacked a national establishment. Nevertheless, our national government continued to coexist (comfortably) for many years with its component states, many of which had established churches in 1787 and continued to have them for

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16. 67 C.J.S. *Officers: When Eligibility Must Be Present* § 18 (1978) (emphasis added); cf. 63C AM. JUR. 2D *Public Officers and Employees* § 55 (2008) (distinguishing qualifications making use of “holding office” language as opposed to “eligibility to” office language); Posting of Steven G. Calabresi to Balkinization, Steven G. Calabresi on the Oath Controversy, <http://tinyurl.com/dbkgo4> (Jan. 25, 2009, 6:38 PM) (“The Oath Clause simply mandates that the President must take the oath before entering on the execution of his office.”). Compare *Bowerbank v. Morris*, 3 F. Cas. 1062, 1064 (C.C.D. Pa. 1801) (No. 1726) (Tilghman, C.J.) (“A removal from office may be either express, that is, by a notification by order of the president of the United States that an officer is removed; or implied, by the appointment of another person to the same office. But in either case, the removal is not completely effected till notice actually [is] received by the person removed.”), with *id.* at 1065-66 (Griffith, J.) (“The new commission must be accepted and shown to the old marshal, or other notice of it given to him, before he can be said to be removed from his office by the will or pleasure of the president. There is then a new patentee, and a proper discharge of the old marshal. I do not go the length of saying the new marshal must be sworn in . . . but he must accept and give notice by showing his commission or otherwise, to his predecessor; and from that time he must be considered as the officer, though before he ‘enters on the duties of his office,’ he must be sworn in.”).

Furthermore, I point out that where the Founders wanted language going to a holder of office or during the whole length of an officer’s term of service, they readily made use of such language. See, e.g., U.S. CONST. art. I, § 6, cl. 2 (“No Senator or Representative shall, during the *Time for which he was elected*, be appointed to any civil Office under the Authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person *holding any Office* under the United States, shall be a Member of either House during his *Continuance in Office*.”) (emphasis added); cf. *supra* note 14.

17. Stone, *supra* note 3, at 5.

many decades to come. Indeed, many scholars have argued that the very purpose of the Establishment Clause of the First Amendment was to prevent disestablishment of state churches by the newly constituted federal authorities,<sup>18</sup> which, if true, is a storyline which is somewhat inconsistent with Stone's the *Founders-intended-a-secular-state* narrative. Those less pluralistic days ended prior to Reconstruction and a return to such times is now foreclosed by the Reconstruction Amendments.<sup>19</sup> So if what we mean by a Christian state—a government comparable to then-contemporaneous England and Scotland, which each had their own established churches, then the government of the early Republic was not a Christian state.<sup>20</sup> But if what we mean by a secular state is a government comparable to that created by the French Revolution—a government that dated its instruments exclusively in terms of the revolutionary calendar and which made no accommodations to its religious elements, then our government did not take that shape either. To me at least it seems less than fully forthcoming to describe the

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18. See AKHIL REED AMAR, *THE BILL OF RIGHTS* 32 (1998).

19. The standard view is that the Fourteenth Amendment incorporates the protections of the First Amendment against the States, which would foreclose the possibility of a state-established religion, quite apart from any national establishment. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Roberts, J.) (“The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947) (Black, J.) (same).

20. I suppose one could argue that after the Act of Union in 1707, the newly formed government of Great Britain lacked—as a purely legal matter—a unified or nationally established church. Rather, its primary component “states”—England with Wales, and Scotland—had their own individual religious establishments, i.e., the Church of England, the Church of Scotland. In this sense, 1787 America was following a British tradition: the component American political entities had religious establishments (or, at least, they were legally free to have them), but not the national government. I am not saying the early Americans were aping the British system, which mandated coexisting legally recognized local religious establishments within a larger national entity. But it may be that the same sort of historical forces resulted in not dissimilar political resolutions and accommodations. Cf. Geoffrey Stone, *University of Chicago Podcast: The World of the Framers: A Christian Nation?*, The University of Chicago Law School: The Faculty Podcast, <http://tinyurl.com/afbn6>, at 00:48:00 (July 11, 2008) (noting that circa 1787-1789, eleven of thirteen states had established churches) (last visited July 27, 2009).

To be sure, my analysis above may be controverted, particularly as a practical, as opposed to a purely legal matter. Eighteenth century British subjects (and even Whitehall law officers) may have taken the view that a pareve free-floating otherwise non-sectarian common Protestantism was established nationally, but the law permitted variants depending on local traditions. It goes without saying that 1787 America was not analogous. The point is that there were any of a number of ways to fairly characterize the British establishment circa the Act of Union. The same may be said for the United States circa 1787. Characterizing the national government instituted by the Constitution of 1787 as “secular” is such a view, but it is only one such view.

government of the early Republic as Christian or secular. It was just more complex than that. History usually works that way. Indeed, my own experience is that text, structure, and history rarely all line up the same way, and if they do, it usually means that we have simply missed something of consequence or (even worse) have drunk the hemlock of our own ideas so deeply that we fail to see the value in other people<sup>21</sup> and in other peoples' points of view.

Which takes me to my second point.

Nowhere in Professor Stone's article is there any discussion of the arguments or any acknowledgment, by name, of the persons he is opposing. He asserts that someone somewhere has made the argument that America is a "Christian nation."<sup>22</sup> He cites, but does not quote, a single article in *The New York Times*<sup>23</sup> (ostensibly, not by one of his

21. See, e.g., Stone, *supra* note 3, at 6 ("Indeed, as we shall see, many of the leaders of the Revolutionary generation were not Christians in any traditional sense. They were [by contrast?] broad-minded intellectuals . . .") (bracketed language added by Tillman). Such claims as these are not capable of falsification or validation in any meaningful sense. It strikes me that this is an unnecessarily contentious pseudo-religious-type claim. My guess is that it was inadvertent, which, all things considered, only makes it worse. Burke, as usual, put it best:

That those persons should tolerate all opinions, who think none to be of estimation, is a matter of small merit. Equal neglect is not impartial kindness. The species of benevolence, which arises from contempt, is no true charity. There are in England abundance of men who tolerate in the true spirit of toleration. They think the dogmas of religion, though in different degrees, are all of moment; and that amongst them there is, as amongst all things of value, a just ground of preference. They favour, therefore, and they tolerate. They tolerate, not because they despise opinions, but because they respect justice.

EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 223 (London, J. Dodsley 10th ed. 1791), available at <http://tinyurl.com/cctrfp>.

22. Stone, *supra* note 3, at 3.

23. See *id.* at 2 n.7 (citing Neela Banerjee, *Clashing Over Church Ritual and Flag Protocol at the Naval Academy*, N.Y. TIMES, Mar. 8, 2008, at A9, available at <http://tinyurl.com/2erfja>). I quote Professor Stone in full:

Let me begin with a recent story from the *New York Times*, which reported that each Sunday, at the Naval Academy Chapel in Annapolis, at a few minutes past eleven a.m., the choir stops singing and a color guard carrying the American flag strides up the aisle. Below a cobalt blue stained-glass window of Jesus, a midshipman dips the American flag before the altar cross. Evangelical Christians in the Navy defend *this practice* on the ground that it represents the highest traditions of our nation. One Air Force Academy graduate, however, objected to *this practice*, stating that the oath he and others had "taken is to protect and defend the Constitution, not the New Testament." Is there a difference?

*Id.* at 2-3 (emphasis added) (footnotes omitted). But see Geoffrey Stone, *University of Chicago Podcast: The World of the Framers: A Christian Nation?*, The University of Chicago Law School: The Faculty Podcast, <http://tinyurl.com/afbnn6>, at 00:02:45 (July 11, 2008) (stating that the objector was a navy graduate) (last visited July 27, 2009). Unfortunately, Stone never tells us what this or any objector's objection is rooted in. (And if there is nothing objectionable here, why does he tell this story?) Is his concern

intellectual opponents, but merely by a reporter reporting on events) and two books,<sup>24</sup> the more recent of which dates from 1987—over twenty years ago. In no place does he discuss precisely who<sup>25</sup> is making the

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tied to forced participation or coercion? Is it government entanglement, including, for example, the expenditure of government funds or the use of government property? Is it government endorsement, or favoritism among sects, or between religion and irreligion? Indeed, it is difficult to square any of these *constitutional* concerns with the actual article cited by Stone. In the *Times*' article, *supra*, the thrust of the objection to the Naval chapel's flag dipping practice is its inconsistency with flag practices elsewhere in the fleet and its inconsistency with the directory provisions of the United States Flag Code. *See* 4 U.S.C. § 1 *et seq.*

It is important to note that to the extent concern here is tied to any forced participation or coercion, or to any favoritism among sects, or between religion and irreligion, or to the expenditure of public funds, or to the use of government property: such concerns would go the very existence of the Naval Academy's chapel and its choir. Professor Stone and apparently the *Times*' article's author's objection, by contrast, is tied to *the practice* of flag-dipping: pure symbolic speech. *See Texas v. Johnson*, 491 U.S. 397 (1989) (Brennan, J.) (holding that expressive content associated with flag burning is protected by the First Amendment); *cf. Cohen v. California*, 403 U.S. 15 (1971) (Harlan, J.). Surely it is not frivolous to suggest that the principles announced in *Texas v. Johnson* and *Cohen v. California* might be applicable in a military academy's chapel?

It goes without saying that if the objector's objection were rooted in coercion, as in mandated participation, then that would be a very serious charge, which if proven would deserve a remedy. But in that situation the substantive content of the Naval Chapel's ritual, i.e., flag-dipping or its absence, and other such purely symbolic speech, would be wholly irrelevant. The coercion theme is touched upon in the *Times*' article, but where the *Times* article does discuss allegations rooted in coercion, the allegations do not relate to the contested flag-dipping ritual or even to the Navy, but apparently relate to incidents involving the Air Force and the Army. Finally, concerns tied to government endorsement of religion are not touched upon in the *Times*' article at all.

24. *See* Stone, *supra* note 3, at 3 n.13 (citing JERRY FALWELL, LISTEN AMERICA! 25 (1980), and TIM LAHAYE, FAITH OF OUR FOUNDING FATHERS 29 (1987)). LaHaye's publication is more than twenty years old. One wonders if LaHaye or Professor Stone remains wed to everything they wrote more than twenty years ago. Of course, we cannot ask this of Falwell; he is dead.

Additionally, Stone relies on Isaac Kramnick and R. Laurence Moore's *The Godless Constitution: The Case Against Religious Correctness*, a book-length 1996 publication. *See* Stone, *supra* note 3, at 3 n.13. *The Godless Constitution* has no footnotes supporting its claims, and it does not provide a complete bibliography of the materials on which it relies. Moreover, the quotations from Robertson, Dobson, Reed, and any number of unnamed evangelicals are *undated*. I would not establish a hard and fast rule that reliance by legal scholars on such an introductory book intended for generalists is always wrong, particularly when alternative sources are not available. But if there really is a genuine ongoing dispute, within academia or in wider American society, as to whether or not the United States was founded as a "Christian nation," then why is reliance on such a text the best Stone can manage? *See infra* note 26 (quoting Kramnick & Moore).

25. Although unwilling to name his opponents and to explain their ideas, he is quite willing to name names in regard to academics with whom he agrees. *See* Stone, *supra* note 3, at 3 ("As the Harvard historian Bernard Bailyn . . ."). Why gratuitously mention Harvard? Would Bailyn's view be of less value if he taught at the University of Southern North Central State [sic] at Hoople? *Cf. id.* at 5 ("From the Declaration of Independence through the adoption of the Bill of Rights, *no one of any consequence* ever referred to the

arguments he has opposed, when and in what forums they have made those arguments, and what arguments or evidence (if any) they have marshaled on behalf of their position. Nor does Stone discuss how *their* positions might differ among one another—including different conceptions of what it might mean to describe the United States as a secular or Christian nation. This aspect of Professor Stone's presentation—one lacking acknowledgment (much less substantial development) of opposing viewpoints—is troubling.<sup>26</sup>

Let me put it another way: when one of Professor Stone's purported intellectual opponents asserts that the United States was founded as a "Christian nation," what does that person mean? Is that a claim about what an American circa 1787 expected about post-1787 demographic development? Is it a claim about the intellectual culture circa 1787? Or, is it an interpretive claim about the original understanding of our founding legal and political documents (and if so, which documents)? Stone never tells us what his opponents mean, only that they are wrong.

Obviously, Stone is opposing someone, somewhere, but because he never tells us precisely who they are, and what precise intellectual claims they are making, his essay comes across as a battle against "ghosts and apparitions."<sup>27</sup> His article is just another tombstone in America's long, useless culture war.

## II. AN ANALYSIS OF PROFESSOR STONE'S CLAIMS RELATING TO EIGHTEENTH CENTURY AMERICAN RELIGIOUS LIFE AND UNIVERSITY CULTURE

I quote Professor Stone in full.

The Christian establishment responded with a vengeance [to the spread of Deism]. As early as 1759, Ezra Stiles warned that "Deism has got such a Head" that it is necessary to "conquer and demolish it." Thirty years later, Timothy Dwight, the president of Yale, published a biting antideist work, *The Triumph of Infidelity*, and

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United States as 'a Christian nation.'") (emphasis added). How precisely does one determine what people are "of any consequence"? *Cf. infra* note 30.

26. *Cf., e.g.,* ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* 23 (1996) ("conced[ing] the existence of a strong countertradition that also dates back to the founders and that has many able defenders").

27. BURKE, *supra* note 21, at 210:

You are terrifying yourself with ghosts and apparitions, whilst your house is the haunt of robbers. It is thus with all those, who, attending only to the shell and husk of history, think they are waging war with intolerance, pride, cruelty, whilst, under colour of abhorring the ill principles of antiquated parties, they are authorized and feeding the same odious vices in different factions, and perhaps in worse.

Edward Gibbon's *Decline and Fall of the Roman Empire* was literally put to the torch at Harvard because of "its uncomplimentary interpretation of early Christianity." In 1784, Ethan Allen, the leader of the Green Mountain Boys and the hero of the Battle of Ticonderoga,<sup>28</sup> published a book-length argument for deism. This work, *Reason the Only Oracle of Man*, was furiously condemned by the clergy. Timothy Dwight accused Allen of championing "Satan's cause," Ezra Stiles charged that Allen was "profane and impious," and the Reverend Nathan Perkins called him "one of the wickedest men that ever walked this guilty globe."<sup>29</sup>

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28. Compare Stone, *supra* note 3, at 21 ("Ethan Allen, the leader of the Green Mountain Boys and the hero of the Battle of Ticonderoga . . ."), with 3 COMPLETE WORKS OF ABRAHAM LINCOLN 210 (John G. Nicolay & John Hay, eds., 1905) (Senator Stephen A. Douglas: "Whilst in Congress, [Lincoln] distinguished himself by his opposition to the Mexican War, taking the side of the common enemy against his own country . . ."). Undoubtedly, Judge Douglas and Professor Stone were factually correct. But is that the correct test here?

29. Stone, *supra* note 3, at 21 (bracketed language Tillman's) (footnotes in the original omitted) (internal footnote added). Stone's selection of Perkins here seems problematic. Although Perkins may have said the quoted material, Stone provides no reason to believe the quotation was intended or understood as a response to Allen's tract on Deism. Apparently, it was said during a 1789 graveside speech, i.e., given some five years after Allen's 1784 publication of *Reason the Only Oracle of Man*. See Kenneth S. Davis, *In the name of the Great Jehovah and the Continental Congress!*, AM. HERITAGE, October 1963, at 65, 77, available at <http://tinyurl.com/bvr4l6> ("Consistent with the view of Ethan [Allen] as an 'awful Infidel, one of ye wickedest men yt ever walked this guilty globe' (so said one Reverend Nathan Perkins, who looked upon Allen's grave with 'pious horror') . . ."). It is possible that Stone is correct, but it is also possible that Perkins' comment had a more secular basis. Perhaps connected to Allen's "heroic" participation in the Yankee-Pennamite Wars, which nearly sparked a major interstate conflict arising from disputed Connecticut and Pennsylvania land grants in the Wyoming Valley? See U.S. CONST. art. III, § 2 (extending the constitutional boundary of federal diversity jurisdiction to disputes between "Citizens of different States" or "Citizens of the same State claiming Lands under Grants of different States"); THE FEDERALIST NO. 7, at 29 (Alexander Hamilton) (J.R. Pole ed., 2005) ("The circumstances of the dispute between Connecticut and Pennsylvania, respecting the lands at Wyoming, admonish us, not to be sanguine in expecting an easy accommodation of such differences."); EDWIN P. HOYT, THE DAMNDEST YANKEES: ETHAN ALLEN & HIS CLAN 228 (1976) ("[In 1785,] Ethan Allen did go down to Pennsylvania. An independent state like Vermont was just what was needed there, he said. He made plans to bring a bunch of the Green Mountain Boys down . . ."). Or, perhaps connected to Allen's (alleged) part in negotiations to take Vermont back into the British Empire? See *id.* at 221 ("Spring of 1783 brought an end to the war with Britain and an end to the uncertainty about Vermont's position. Although Ira and Ethan and some others still thought seriously of joining the British, the impetus was gone.").

In any event, is not a quotation from the Reverend Nathan Perkins a little *too* obscure? How does Professor Stone know and how could the reader know if this man was representative of the clergy or "Christian establishment" of his day? See 2 WILLIAM B. SPRAGUE, ANNALS OF THE AMERICAN PULPIT 1-4 (New York, Robert Carter & Bros. 1857) (entry for Nathan Perkins, D.D.), available at <http://tinyurl.com/d65zht>. Perkins' claim to fame—such as it is—was being Noah Webster's grammar school

Stone's consistent use of terms like "with a vengeance," "warn[]," "biting," "accused," and "charged" is puzzling. Is it really true the clergy not only "condemned" Allen's *Reason the Only Oracle of Man*, but that they did so "furiously"? How does one fairly distinguish a furious condemnation from a plain condemnation from a mere emphatic disagreement or an honest debate over strongly held beliefs and principles? The choice of such terms is, in most (albeit, not in all) cases, indicative of a lack balance, of a lack of perspective. Much of what Stone describes above was nothing more than writings and speeches in private letters, sermons, and books. In law review articles, traditionally, such speech is usually characterized in less judgmental and more neutral terms, i.e., as core First Amendment protected activity (although there was, of course, no First Amendment at this time).<sup>30</sup>

Indeed, if such speech is fairly characterized as "respond[ing] with a vengeance," merely because it opposes other speech and comes next-in-

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teacher. See Noah Webster's Story, <http://noahwebsterhouse.org/anoahwebsterstory.html> (last visited July 20, 2009). Undoubtedly, men such as Ethan Allen and Nathan Perkins have and had their uses to their society and to their times. I do not presume to judge them. However, in making that statement, I do not wholly give up on the concept of judging the past and those who made it for us. Rather, I would maintain that the same intellectual generosity which allows us to think moderately well of Allen ought also to allow us to think well of Perkins. The test is really a simple one. Had you and your children lived in their times, who would you have preferred to have had as a neighbor for yourself and for them? The armed military adventurer or the educator who may have had parochial theological views? Compare BURKE, *supra* note 21, at 47-48 ("People will not look forward to posterity, who never look backward to their ancestors."), with *id.* at 141 ("No one generation could link with the other. Men would become little better than the flies of a summer.").

30. For a good example of the nonjudgmental milquetoast law review genre, see Professor Stone's description of Melville B. Nimmer's performance in *Cohen v. California*.

In 180 years of Supreme Court history, no one had ever uttered the word "fuck" in the Supreme Court chamber, and Burger was determined that it would not happen on his watch. Thus, as Nimmer approached the podium to begin his argument, the white-haired Burger leaned over the bench and said, "Mr. Nimmer, . . . the Court is thoroughly familiar with the factual setting of this case, and it will not be necessary for you . . . to dwell on the facts." To which Nimmer, understanding full well the importance of saying the word, replied, "At Mr. Chief Justice's suggestion . . . I certainly will keep very brief the statement of facts . . . . What this young man did was to walk through a courthouse corridor . . . wearing a jacket upon which were inscribed the words 'Fuck the Draft.'" And lo and behold, the walls of the courthouse did not crumble. At that moment, I believe, Mel Nimmer won his case.

Stone, *supra* note 3, at 2 (footnotes omitted). As a factual matter, Stone is almost certainly wrong. The exclamation was said many times—even by the Justices themselves—just not in open court, just not on the record. Cf. 5 J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 834 (2003) ("Indifference and neglect often do much more damage than outright dislike . . ."). If you, the reader, believe I am merely telling a joke here at Professor Stone's expense (or at my own), you are seriously mistaken, and I would invite you to read the remainder of this Article. Cf. *supra* note 25.

time, then this Article and every other academic disagreement will fall under the orbit of that expression. At that point the phrase itself ceases to be meaningful. Admittedly, not all of the statements quoted by Stone were vanilla, even-handed, and unthreatening: Stiles' "conquer and demolish" statement does seem a touch strong.<sup>31</sup> But Stiles looks much better in fuller context.

It is true with this Liberty [of accepting deistical books into religiously-affiliated university libraries] Error may be introduced; but turn the Tables [and see that] the propagation of Truth may be extinguished [if you do otherwise]. Deism has got such Head in this Age of Licentious Liberty, that it would be in vain to try to stop it by hiding the Deistical Writings: and the only Way left to conquer & demolish it, is to come forth into the open Field & Dispute this matter on even Footing—the Evidences of Revelation in my opinion are nearly as demonstrative as Newton's Principia, & these are the Weapons to be used . . . . *Truth* & this alone being *our* Aim in fact, open, frank & generous we shall avoid the very appearance of Evil.<sup>32</sup>

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31. Even if Stone's snippets from the writings of Stiles, Dwight, and Perkins had been fairly representative of their individual writings, Stone's conclusion would still not necessarily follow. Compare BURKE, *supra* note 21, at 213 (emphasis added):

I can allow in clergymen, through all their divisions, some tenaciousness of their own opinion; some overflowings [sic] of zeal for its propagation; some predilection to their own state and office; some attachment to the interest of their own corps; some preference to those who listen with docility to their doctrines, *beyond those who scorn and deride them*. I allow all this, because I am a man who have [sic] to deal with men, and who would not, through a violence of toleration, run into the greatest of all intolerance. I must bear with infirmities until they fester into crimes.

with Ethan Allen History, <http://www.uvm.edu/~vhnet/hertour/eallen/eahistory.html> (noting that Allen's *Reason the Only Oracle of Man* provided "Ethan [Allen] [with an opportunity] to lambaste New England's clergy for what he saw as their failure to recognize the dignity of ordinary people.") (emphasis added) (last visited July 20, 2009).

32. Letter from Ezra Stiles to Rector Thomas Clap (Aug. 6, 1759), in I. WOODBRIDGE RILEY, *AMERICAN PHILOSOPHY: THE EARLY SCHOOLS* 216, 217 (New York, Dodd, Mead & Co. 1907) (cited by Stone, *supra* note 3, at 21 n.155), available at <http://tinyurl.com/bt73ze>; G. ADOLF KOCH, *REPUBLICAN RELIGION: THE AMERICAN REVOLUTION AND THE CULT OF REASON* 239 (Peter Smith reprint 1964) (New York, Henry Holt & Co. 1933). Of course, Stiles had other moods, as do we all. See Davis, *supra* note 29, at 77:

When news of the [death of Ethan Allen] reached New Haven, the Reverend Doctor Ezra Stiles, president of Yale, known as an "inveterate chronicler" of things which might interest posterity, noted in his diary: "General Ethan Allen of Vermont died and went to Hell this day."

Ezra Stiles might have been a bit of a pill to have around; he may have been difficult to sit next to at high table, particularly if the port were freely flowing. But to describe Stiles or men like him as vaguely threatening is an act of the historical imagination that would even make practitioners of magic realism green with envy. Cf. J.R.R. TOLKIEN, *THE LORD OF THE RINGS/THE TWO TOWERS* 29 (1965) ("For not we but those who come after



How is this an example of the “establishment respond[ing] with a vengeance” to the spread of Deism? If anything Stiles overflows with a *very boring, almost trite* excess of Brandeisian toleration,<sup>33</sup> although he clearly is attached to his own parochial theological views. To me at least, Stone’s “conquer and demolish” snippet misses much more than it explains.

As to Stone’s fantastic claim<sup>34</sup> that circa 1789 Gibbon’s *Decline and Fall* was “literally put to the torch at Harvard,”<sup>35</sup> I see no evidence that any such event ever happened. To make his case, Stone wholly relies on Professor Kerry Walters’ 1992 publication: *Rational Infidels: The*

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will make the legends of our time. <sup>[1]</sup>The green earth,<sup>[1]</sup> you say? That is a mighty matter of legend, though you tread it under the light of day!”).

33. Cf. DAVID CORNWELL (*nom de plume* John le Carré), *THE SECRET PILGRIM* 28 (1991) (“‘That’s the trouble in our job, Ned,’ [the spy master] explained contentedly . . . ‘Life’s looking one way, we’re looking the other. I like an honest-to-God enemy myself sometimes, I don’t mind admitting. Take[s] a lot of finding, though, don’t they? Too many nice blokes about.’”).

34. The reader may believe that my use of “fantastic claim” in this manner is inappropriate, if not indistinguishable from the (arguably) exaggerated intellectual claims that I criticize in others. To be sure, I do not use “fantastic claim” (as opposed to “a knowingly or recklessly false claim”) as a term of opprobrium. I use it purely descriptively.

Indeed, the fantastic claim plays a necessary role in the development of law and other disciplines. The fantastic claim is the placeholder for interesting, but not yet fully formed or supported ideas, put forward by authors in the hope of full development (by themselves and others) should the line of research prove fruitful. The fantastic claim is also the placeholder for deeply idiosyncratic or wildly unpopular ideas whose justification will only be had (if at all) after a change of heart or mind within a discipline or by wider society. In short, I have made fantastic claims in my own publications (or, at least, so I have been told), and I do not regret having done so. See, e.g., Steven G. Calabresi, *Rebuttal, Does the Incompatibility Clause Apply to the President?*, 157 U. PA. L. REV. PENNUMBRA 134, 141 (2008) (critiquing Tillman’s position as “utterly implausible”) (emphasis added), *responding to* Seth Barrett Tillman, *Opening Statement, Why President-Elect Obama May Keep His Senate Seat After Assuming the Presidency*, 157 U. PA. L. REV. PENNUMBRA 134, 135-40 (2008) (arguing that the Incompatibility Clause does not apply to the office of President), *available at* <http://www.pennumbra.com/debates/pdfs/GreatDivorce.pdf>. And, happily, sometimes the change of mind comes surprisingly quickly. Compare Calabresi, *supra*, at 145 (2008) (affirming that the president “take[s] office in a public ceremony with elements of a coronation, and there is a magic moment when the powers of office becomes invested in them which is when they take the oath of office”), *with* Posting of Steven G. Calabresi to Balkinization, *supra* note 16 (2009) (“The oath is thus *not* our Constitution’s analog to the crowning of a King. The Oath Clause simply mandates that the President must take the oath before entering on the execution of his office.”) (emphasis added), *and* Bruce Peabody, *Imperfect Oaths, the Primed President, and an Abundance of Constitutional Caution*, 104 NW. U. L. REV. COLLOQUY 12, 27 (2009) (arguing that “until the [Article II] oath is recited” by the President, he is “den[ied] . . . the full powers of [his] office” thereby “potentially ‘blocking’ the exercise of the federal executive power [prior to the President’s taking the oath]”).

35. Stone, *supra* note 3, at 21.

*American Deists*.<sup>36</sup> Walters does not actually say “torched,” he says “burned.”<sup>37</sup> Walters, in turn, relies on William Henry Channing’s *The Life of William Ellery Channing, D.D.* and G. Adolf Koch’s *Republican Religion*.<sup>38</sup> But neither work supports Walters’ position. Channing merely records that “[t]he patrons and governors of the college made efforts to counteract the effect of the[] [principles of the French Revolution] by exhortation, and preaching, and prayer, as well as by the publication of and distribution of good books and pamphlets.”<sup>39</sup> I see no indication of any book-burning. By contrast, Koch writes that in 1791 “Gibbon’s famous work was publicly banned . . . by the President of Harvard College from that institution.”<sup>40</sup> Again, no book-burning, no torching, no auto-da-fé.

Nevertheless book-banning at a university is pretty terrible behavior (or, at least, it is when adjudged under contemporary standards). But it seems there was no book banning either! Koch’s only source is John Quincy Adams’ *Life in a New England Town: 1787, 1788*.<sup>41</sup> Adams does not indicate that Gibbon was banned; rather, Adams indicates that in setting the curriculum the President preferred Millot’s *Elements of*

36. See *id.* at 21 & n.156 (citing KERRY WALTERS, *RATIONAL INFIDELS: THE AMERICAN DEISTS* 8-9 (1992)).

37. KERRY WALTERS, *RATIONAL INFIDELS: THE AMERICAN DEISTS* 9 (1992). Like Kramnick & Moore’s *The Godless Constitution*, discussed *supra* notes 24 and 26, Walters’ book is not fully cited. As a result, many of his factual claims cannot be checked (or, at least, it is unclear what sources one should consult in order to check his claims). For example, he states that “Harvard officials” made Watson’s *Apology for the Bible* “required reading.” *Id.* However, Channing’s *The Life of William Ellery Channing, D.D.* (Walters’ apparent source) only indicates that the *Apology* was distributed to students. See *infra* note 39 (1899 ed.), at 31; *id.* (1880 ed.), at 31. To be clear, nothing here is meant as a criticism directed to Professor Walters and the citation practices prevailing in books intended for a generalist audience. (It is certainly possible that Professor Walters relied on other sources, but chose not to cite them.) The question for us is whether such sources as *Rational Infidels* or *The Godless Constitution*—standing alone or even together—fairly support contentious historical claims made in law review articles. I submit that they do not. Cf. *supra* note 24 (criticizing Professor Stone’s reliance on Kramnick & Moore’s *The Godless Constitution* because it is not fully sourced).

38. See WALTERS, *supra* note 37, at 9 & 9 nn.8, 9 (citing G. ADOLF KOCH, *REPUBLICAN RELIGION: THE AMERICAN REVOLUTION AND THE CULT OF REASON* 242 (1933), and W.H. CHANNING, *LIFE OF WILLIAM ELLERY CHANNING, D.D.* 30 (Boston, Am. Unitarian Ass’n 1880)).

39. WILLIAM HENRY CHANNING, *THE LIFE OF WILLIAM ELLERY CHANNING, D.D.* 31 (Boston, University Press 6th ed. 1899) (centennial ed. 1880) (1848), available at <http://tinyurl.com/c8fc9x>; WILLIAM HENRY CHANNING, *LIFE OF WILLIAM ELLERY CHANNING, D.D.* 31 (Boston, Am. Unitarian Ass’n 1880).

40. KOCH, *REPUBLICAN RELIGION*, *supra* note 32, at 290 n.6; see also G. ADOLF KOCH, *REPUBLICAN RELIGION: THE AMERICAN REVOLUTION AND THE CULT OF REASON* 290 n.6 (New York, Henry Holt & Co. 1933) (same).

41. See *id.* (citing JOHN QUINCY ADAMS, *LIFE IN A NEW ENGLAND TOWN: 1787, 1788/DIARY OF JOHN QUINCY ADAMS* 113 n.1 (Boston, Little, Brown, & Co. 1903)).

*History*<sup>42</sup> to Gibbon's *Decline and Fall*.<sup>43</sup> To sum up, in 1791 Harvard made a mundane curriculum decision; it was recorded in a 1903 publication; in 1933 it became a book-banning; in 1992 it became a book-burning, and in 2008 Professor Stone tells us Gibbon was "literally put to the torch"<sup>44</sup> at Harvard. *Literally*.

The constellation of facts, misunderstandings, misstatements, exaggeration, and error hardly seems believable.<sup>45</sup> Still, there is no reason to judge Stone harshly: such mistakes do happen.<sup>46</sup> His mistake, such as it was, was to rely on a single source, Walters, who, apparently misquoted Koch, who expanded on Adams' initial statement.

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42. ABBÉ CLAUDE FRANÇOIS XAVIER MILLOT, *ELEMENTS OF GENERAL HISTORY* (Worcester, Isaiah Thomas 1789); ABBÉ CLAUDE FRANÇOIS XAVIER MILLOT, *ELEMENTS OF GENERAL HISTORY* (Salem, Thomas C. Cushing 1796); ABBÉ CLAUDE FRANÇOIS XAVIER MILLOT, *ELEMENTS OF ANCIENT HISTORY* (New York, Mott & Lyon 1797).

43. See JOHN QUINCY ADAMS, *LIFE IN A NEW ENGLAND TOWN: 1787, 1788/DIARY OF JOHN QUINCY ADAMS* 113 n.1 (Boston, Little, Brown, & Co. 1903), available at <http://tinyurl.com/alj5yx>; see also The Harvard Guide: History, Lore, and More, <http://www.hno.harvard.edu/guide/lore/lore9.html> (entry for 1791) (last visited July 20, 2009).

44. Stone, *supra* note 3, at 21.

45. There is little doubt in my mind that each and every misstep was made in good faith. Still, one can only shed a tear in contemplation of what current and future law students, law school academics, academics in allied fields, and jurists will publish in reliance on Stone, Walters, and Koch. See, e.g., Leon Jackson, *The Rights of Man and the Rites of Youth: Fraternity and Riot at Eighteenth-Century Harvard*, in *THE AMERICAN COLLEGE IN THE NINETEENTH CENTURY* 46, 54 & n.32 (Roger Geiger ed., 2000) (asserting that Gibbon's *Decline and Fall* was banned) (citing HERBERT M. MORAIS, *DEISM IN [ ] EIGHTEENTH CENTURY [AMERICA]* 161 n.5 (New York, Russell & Russell 1960) (New York, Columbia Univ. Press 1934) (asserting that Gibbon's *Decline and Fall* was banned, but failing to cite any authority)), available at <http://tinyurl.com/bnmt69> (citing MORAIS, *DEISM* (1960 ed.), <http://tinyurl.com/b8kv4q> (1934 ed.)). Both Koch, *supra* note 32, and Morais, *supra*, had New York publishers and published within a year of one another, during the Great Depression. Indeed, Morais cites Koch several times. See, e.g., MORAIS, *DEISM*, *supra*, at 14 n.1 (1934) (citing KOCH, *REPUBLICAN RELIGION*, *supra* note 40, at 144 (1933)); *id.* at 130 n.28 (citing KOCH, *REPUBLICAN RELIGION*, *supra* note 40, at 290-01 (1933)). See generally MORAIS, *DEISM* (1934), <http://tinyurl.com/d26r5f> (searching text using "Koch"). It is interesting to speculate that Morais relied on Koch in regard to his assertion that Gibbon's *Decline and Fall* was banned, as later authors did, directly and indirectly. See, e.g., Alfred L. Brophy, *The Law Book in Colonial America*, 51 *BUFF. L. REV.* 1119, 1120 n.3 (2003) (citing Leon Jackson's *The Rights of Man and the Rites of Youth* in regard to the purported banning of Gibbon's *Decline and Fall*).

46. Stone is by no means alone. I have seen very similar mistakes in relation to any number of constitutional provisions and associated historical claims. For example, the history of the Succession Clause, the Orders, Resolutions, and Votes Clause, the Journals Clause, the Quorum Clause, and the Opinions Clause were profoundly *miswritten* by earlier academics and jurists. Current academics seem wholly unable to escape the clutches of these prior errors. Someday I hope to return to these issues.

... Here we come to an awkward and difficult point. Leave aside Professors Stone, and Walters, and Koch—what about you, the reasonable and well-informed reader. When you read Stone's claim in regard to a book burning at Harvard, circa 1789, did you believe it? Try to remember your reaction, if any. Did it seem shockingly wrong, or did you just read past his claim as a matter of no real consequence, or did it seem reasonably tenable to you? And if you thought the latter, what other historical fictions (or unsupported factual claims) might you believe in error (or absent sufficient evidence), and what does that say about the prejudices you may harbor in relation to people different from yourself?

Did you blush when you read Stone's claim, or are you blushing now?

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### III. A CRITIQUE OF PROFESSOR STONE'S SELECTION AND ANALYSIS OF EARLY AMERICAN MATERIALS

Professor Stone's use of historical materials, both during the era of the founding and post-ratification, seems oddly selective.<sup>47</sup> His essay focuses on Franklin, Jefferson,<sup>48</sup> John Adams, Washington, and

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47. Stone cites any number of deists as having "had a profound influence on the founding generation." Stone, *supra* note 3, at 6 (stating that "deism" was "[t]he most important religious trend of the mid-eighteenth century"); see, e.g., *id.* ("John Toland, for example, argued that in order to be credible, a religion must be logical and it must be consistent with the laws of nature . . . . And Matthew Tindal . . ."); *id.* at 6 n.38 (citing Anthony Collins). But he gives the reader no reason to believe that these particular authors were widely read by or influenced the world-view of the Founders, Ratifiers, or the American public. Cf., e.g., BURKE, *supra* note 21, at 133:

Who, born within the last forty years [between 1750 and 1790], has read one word of Collins, and Toland, and Tindal, and Chubb, and Morgan, and that whole race who called themselves Freethinkers? Who now reads Bolingbroke? Who ever read him through? Ask the booksellers of London what is become of all these lights of the world.

Indeed, even if one conceded that these philosophers influenced the American mind, it is not clear that they were, in fact, deists as Professor Stone argues. See W.R. Sorley, *Anthony Collins's Discourse of Free-thinking*, in 9 THE CAMBRIDGE HISTORY OF ENGLISH AND AMERICAN LITERATURE pt XI, § 12, at 326-27 (A.W. Ward & A.R. Waller eds., 1913) ("[T]here is no evidence that [Toland] ever accepted the cardinal point of what is commonly called deism—the idea of God as an external creator who made the world, set it under certain laws, and then left it alone. He was a free-thinker rather than a deist. And this, also, describes the position occupied by Anthony Collins . . .") (footnote omitted), available at <http://www.bartleby.com/219/1112.html>.

48. Stone's reliance on Jefferson's *post-ratification* views seems, as a methodological matter, misplaced. See Stone, *supra* note 3, at 25 ("By the end of his life in 1826, Thomas Jefferson could look back with a sense of despair, because, in his view,

Paine<sup>49</sup>—all of whom were active in the Revolution. Indeed, the first

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American society was going backward.”). By 1826, Jefferson may have changed his views in regard to any number of issues that were of relevance in 1776 and in 1787.

Moreover, Jefferson continued to own slaves from 1776 through 1826. Perhaps his judgment in regard to what was “backwards” is something that we ought not to rely on? Perhaps his “despair” would have been more in tune with the spirit of ‘76, then-current political reality, and the consequential future risks his country faced had it been connected to (and actively directed against) the overwhelming power of the slavocracy and slavery—if only that small amount under his direct personal control? Would that have been a better use of his time (and Professor Stone’s and our own) than mooning over the religious sensibilities of his (and our) neighbors? Cf. AMAR, *AMERICA’S CONSTITUTION*, *supra* note 6, at 347 (“America’s third president . . . had passionately condemned slavery in his early years but did rather little to back up his youthful rhetoric after his slavery-supported triumph in 1801.”).

Indeed, just prior to this Article going to press, in a public lecture, Professor Stone opined:

[The separation of church and state] is the fundamental issue posed by the Second Great Awakening. And it remains a fundamental issue today. As citizens, advocates of Sunday closing laws, temperance legislation, *the abolition of slavery*, anti-abortion laws, prohibitions of stem cell research and laws for begetting same sex marriage are free to support such policies because they honestly believe they serve constitutionally legitimate ends. And they are, of course, also completely free to urge others to embrace and to abide by their own religious beliefs. But what they are not free to do, what they must strive not to do if they want to be good citizens is to use the law to impose their own specific religious beliefs upon others.

Geoffrey R. Stone, *Georgia State University Henry J. Miller Distinguished Lecture: The Second Great Awakening*, <http://tinyurl.com/y8u9un7>, at 0:52:21.2 (Oct. 15, 2009) (emphasis added); see also Geoffrey R. Stone, *The Perils of Religious Passion: A Response to Professor Samuel Calhoun*, 57 UCLA L. REV. DISCOURSE 15 (2009), <http://uclalawreview.org/?p=500>. Is it really so obvious that a citizen circa 1860 who had supported public policies seeking to limit or to overthrow slavery on sectarian religious grounds failed to live up to the aspirational goals of our constitutional order? Is it a matter of concern that slave owners were, to use Professor Stone’s terms, “imposed” upon? One wonders why Professor Stone sees the legal order so clearly through the eyes of Jefferson and other slave owners, rather than the slave who might have had his shackles loosened? Is it not possible that in our world of second bests, First Amendment church-state absolutism ought, in some circumstances, to give way to other values and that in making that difficult weighing of competing values responsible persons should be loathe to declare our fellows bad citizens merely because they weigh things differently than we do?

49. See, e.g., Erwin Chemerinsky, *Why Church And State Should Be Separate*, 49 WM. & MARY L. REV. 2193, 2204-05 (2008) (footnote omitted):

But I must admit, in all honesty, that I believe one could find just as much evidence and just as many quotations from the Framers for each of the [competing theories of the First Amendment]. This is why I believe that we cannot resolve modern constitutional issues by looking back at history; history is far too equivocal for that. The Framers were not of one mind with regard to religion. Indeed, the Framers varied greatly among themselves in the degree of their own religious observance.

Although there is much here with which I agree, I believe Professor Chemerinsky errs in part. To the extent that we are interested in the intent of the Framers, their “degree of [personal] religious observance” is the wrong specific intellectual tradition to examine in

three signed the Declaration of Independence. But between the 1776 Declaration and the Constitution of 1787 was a war, a flurry of state constitution drafting, an intermediate national constitution, Shays' Rebellion, and more than a decade. To conflate the world view of (some of) those who participated in 1776 with the world view of a different (albeit overlapping) set of men at a different time who guided events in 1787 requires substantial justification.<sup>50</sup> Stone just elides over the distinction.<sup>51</sup> Indeed, at the time of the framing and during ratification, Jefferson and Adams were absent on diplomatic missions. Paine was abroad. Washington and Franklin attended the Philadelphia Convention, but Washington acted as the presiding officer and played little active role in debate. Franklin, like Washington, was also mostly cast in the role of elder statesman.

Still let us assume, as Professor Stone argues, that each of these five influential men personally subscribed to Deism. Should that inform our understanding of the Constitution, even in regard to the intellectual milieu at the time of the Founding? Is not that view strangely under

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regard to understanding Framers' intent. What we should be interested in is their views in regard to how a human being and citizen should translate (*if at all*) personal observance into generalized legal obligations and exemptions. *See generally* Bret Boyce, *Equality and the Free Exercise of Religion*, 57 CLEV. ST. L. REV. 493 (2008). It would be an empirical error of the first order to believe that merely because a set of persons' views are in accord as to personal observance, their views in regard to framing the legal order are similarly congruent. And absent such congruence, we have no reason to be interested in their degree of personal religious observance. *But see* Posting of Alfred Brophy to The Faculty Lounge, Stone on the Nature of the Founders' Christianity, <http://tinyurl.com/apwvw2> (Oct. 22, 2008, 8:46 AM):

[Professor Stone] makes the important—and I would have thought obvious, except that it hasn't been much discussed of late—point that our country's founders were often liberal Protestants. They took a very broad approach to their belief in God—many were deists. They were children of the Enlightenment. As I say, I don't think that's news to people who work in early American religion; but disciplinary barriers are mighty high and so I suspect this is an important insight for us in the law businesses. And Stone's synthesis of the learning of the last generation of historical scholarship helps lawyers understand the religious context of our Constitution.

50. *See generally* Richard D. Brown, *The Founding Fathers of 1776 and 1787: A Collective View*, 33 WM. & MARY Q. (3d ser.) 465 (1976). There is now substantial academic and judicial discussion of the role (if any) for the Declaration of Independence in constitutional interpretation. *See, e.g.,* *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 255 (2003) (Scalia, J., concurring in part, dissenting in part) (quoting THE DECLARATION OF INDEPENDENCE); Thomas B. McAfee, *Does the Federal Constitution Incorporate the Declaration of Independence?*, 1 NEV. L.J. 138 (2001).

51. *See, e.g.,* Stone, *supra* note 3, at 21-22 ("Did the Framers intend the United States to be a Christian nation? Clearly they did not. The Declaration of Independence marked a fundamental shift in our history."). I do not disagree with either of these statements. But I see no reason to believe that the latter supports the former. Unfortunately, Professor Stone is not alone in making this type of error. *See supra* note 2 (quoting a Justice Rehnquist dissent).

theorized?<sup>52</sup> It has happened from time to time that religious men have worked towards pluralistic (and, even, secular) political orders. It has also happened from time to time that irreligious men have served inquisitors (of religious and secular varieties). The fact that the five Americans discussed by Stone may have been Deists, only, at best, opens as a possibility for our enquiry what they intended to build, what they hoped to achieve. So although it is a possibility that their religious or philosophical sensibilities influenced their political views, as to how the Constitution should be drafted, as to how the new Republic should be ordered, it is not self-evident that it did influence them. It is not even presumptively true. To put it another way, if Deism (or, Christianity, for that matter) did not actually inform *them* in regard to building the American political order, it is difficult to see how knowledge of such abstract philosophical (or religious) views should inform *us* in understanding the political order they built. I suppose that is a contestable view. Still, I have not seen anyone actually contest it, including Professor Stone, which to some extent proves my point, if only elliptically.

And post-ratification materials? What have our federal courts said about the issue under discussion? Customarily, law professors discuss such materials.<sup>53</sup> But not Professor Stone; he fails to acknowledge that they even exist. For example, in 1892, Justice Brewer—writing for an unanimous Supreme Court—wrote that “this is a Christian nation.”<sup>54</sup> I

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52. See *supra* note 49 (explaining that commitments relating to personal beliefs and observance do not necessarily translate into commitments in regard to public law and constitution drafting).

53. For a representative example of the usual protocol see GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 529 (2004):

Lincoln’s suspensions of habeas corpus were declared unconstitutional by the Supreme Court in *Ex parte Milligan* . . . . These after-the-fact [Supreme Court] judgments [in regard to the wartime suspension of civil liberties] should not be controversial. They are sound conclusions based on comprehensive information about the actions and motives of the government in each of these [wartime] episodes.

54. *Compare Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (Brewer, J.) (asserting that “this is a Christian nation”), and *Vidal v. Girard’s Ex’rs*, 43 U.S. 127, 198 (1844) (Story, J.) (denominating the United States, or perhaps Pennsylvania, as a “Christian country”), and *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (Douglas, J.) (“We are a religious people whose institutions presuppose a Supreme Being.”), and *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting) (noting that “the federal government’s symbology has been Christian—down to the dating of the Constitution”), with Stone, *supra* note 3, at 3 (noting that “modern-day Christian evangelicals assert that the United States was founded as a ‘Christian nation’”). Why single out nonacademic modern-day evangelicals for making this intellectual claim? It may be wrong, but they are hardly alone. Judge Easterbrook, for example, is one of Professor Stone’s colleagues at the University of

happen to think Brewer and the Court wrong.<sup>55</sup> My guess, and it is just a guess, is that Melville B. Nimmer would have thought it wrong too. But I suspect that he may also have told us why.

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Chicago. Cf. KRAMNICK & MOORE, *supra* note 26, at 23. Even Professor Stone does not refrain from using such language when it serves a useful purpose. See, e.g., Stone, *The Perils of Religious Passion*, *supra* note 48, at 23-24 ("But just as we would expect a predominantly Muslim community to strive to know the difference between their religious beliefs about alcohol and public policy concerns about alcohol, so too should we expect such respect for the law from our predominantly Christian nation.").

55. See Wallace, 472 U.S. at 107 (Rehnquist, J., dissenting) ("[N]o amount of repetition of historical errors in judicial opinions can make the errors true."). See generally Lawrence B. Solum, Semantic Originalism (Illinois Pub. Law Research Paper No. 07-24) (Nov. 22, 2008) (unpublished manuscript, posted on the Social Science Research Network (a/k/a SSRN)), available at <http://tinyurl.com/ndp845> (last visited July 20, 2009).



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